1978

Richard Ross v. Carol Ross et al : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

RICHARD ROSS, Plaintiff and Appellant, vs. CAROL ROSS, Defendant, Counter-claimant, Respondent, and Appellant, and UTAH STATE DEPARTMENT OF SOCIAL SERVICES, Intervenor and Appellee.	)	Supreme Court No. 15800

BRIEF OF APPELLANT RICHARD ROSS

Appeal from the Judgment of the Third Judicial District Court of Salt Lake County, the Honorable David Dee, Judge

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STATEMENT OF THE NATURE OF THE CASE

This is an action by plaintiff Richard Ross to modify a California divorce decree, with a counterclaim by Carol Ross for judgment as to arrearages in child support and alimony.

DISPOSITION IN LOWER COURT

This case was tried by the Court, sitting without a jury, commencing on March 3, 1978, and continuing until March 17, 1978, whereon the matter was concluded.

Subsequent to the trial, the trial court issued a Memorandum Decision (R. 215-216) wherein it found the doctrines of laches, equitable estoppel, and presumably, release and waiver, not to apply to the case, and granted judgment against plaintiff on defendant's counterclaim for the sum of $31,151 as the amount due after deductions for certain amounts credited and paid by plaintiff. The Court also granted judgment in favor of the Utah State Department of Social Services in the sum of $1,544, for reimbursement of welfare paid to the defendant. The trial court eventually entered an Amended Order dated April 11, 1978, wherein, after making all deductions, judgment was granted against the plaintiff in the sum of $24,451 in favor of defendant, and against plaintiff in the sum of $1,544, in favor of the Department of Social Services.

At the same trial, the Court modified the California divorce decree reducing the alimony from $150 to "0" , and

the child support from $100 per child to $75 per child. (T. 231-2)

RELIEF SOUGHT ON APPEAL

Appellant, Richard Ross, seeks reversal of the judgments against him in favor of both Carol Ross and the Department of Social Services for arrearages in child support and alimony, on the grounds of equitable estoppel, waiver and release. In order to economize on space, plaintiff has also included in this brief his argument which would normally be presented in the response to the brief of defendant Carol Ross, who is appealing the modification of the California decree. Therefore, plaintiff seek also that the trial court's judgment modifying the Californ decree be upheld.

STATEMENT OF FACTS

The parties in this action were originally divorced in California in February, 1971. The defendant herein was awarded alimony in the sum of $150 per month and child support in the sum of $100 per month per child for each of three minor children whose ages at that time were 6, 9 and 10. In that action, the defendant herein was the plaintiff. Prior to trial in this matter in Utah, the parties stipulated that the California divorce decree should be adopted by this Court. (R. 37-8)[1]

At the time of the California divorce, the plaintiff was employed as a mechanic and making approximately $1,000 per month. (T. 190)[2] His wife, Carol Ross, was awarded the California home which she sold sixteen months later for a $25,000 profit. (T. 215) Mr. Ross was not represented by counsel at that California proceeding. (T. 155)

The plaintiff frankly and honestly testified that immediately after the California proceeding, he left the state of California for Dallas, Texas, where he began living under an assumed name (Henderson). He candidly stated his reasons as wanting to avoid making the payments under the

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[1]The record, aside from the transcript of the trial, will be designated by "R.", and the numbering refers to the stamped number on the lower right.

[2]The transcript will be designated by "T.", and the numbering will refer to the typed number on the upper, right hand side of the page.

divorce decree because he couldn't afford them and didn't want to go to jail. (T. 10, 155) He made no attempt to justify this action at trial. (T. 10, 155)

Plaintiff nonetheless evinced a genuine concern for the welfare of the children since he called his mother, Mrs. Mary McKendrick, who lived near the children, immediately upon his arrival in Texas and inquired about their welfare. (T. 82-3, 153-4) Both the plaintiff, and his mother, who flew in from California, testified that in these conversations that occurred in the days immediately after he left California, plaintiff stated that he would send between $200 and $250 per month for the support of the children by means of a check to Mrs. McKendrick. Mrs. McKendrick was thereupon instructed to purchase clothing, food, etc. for the children and take it to them diretly. (T. 83-4, 12, 153-5)

Mrs. McKendrick affirmed that she did receive on the average of $200 to $225 per month and that she did spend the same, every dollar of it, for the welfare of the children. (T. 83, 85, 90) Mrs. McKendrick further indicated that a number of the checks came from Mr. Ross' roommate and some came by way of money orders because Mr. Ross had not yet become established in the new town. (T. 88) As further evidence of concern for the family, he instructed Mrs. McKendrick to deliver to Carol an automobile for her use (T. 89), which she admitted receiving and using. (T. 61)

Defendant first claimed not to have had contact again with the plaintiff until February, 1973 (T. 34), but

later admitted under cross-examination that plaintiff called her as early as October, 1972. (T. 59) Prior to that, Carol had made efforts to locate the plaintiff by going to the district attorney's office in California to seek legal action against plaintiff. (Ex. 25, letter of 11/20/72 from the Department of Welfare, San Mateo County, Cal.) Mr. Zambos, a special investigator for the Department of Recovery Services, also testified that the defendant went on welfare in Salt Lake City in October, 1972, and that from that time, through approximately September, 1973, his department was looking for the plaintiff to enforce his support obligations. (T. 102-108)

Although Carol first claimed not to have heard from plaintiff or discussed child support with him, until February 18, 1973 (T. 34, 62), she later admitted that he called her in January, 1973, and told her of his desire to "make some arrangements for it (child support)". (T. 63)

Both plaintiff and defendant testified that plaintiff flew to Salt Lake City in February, 1973, rented a car, and lived in a motel, for approximately three days, during which time he saw the children and the defendant on several occasions. (T. 65-7; 160-1)

Beginning in March, 1973, defendant Carol Ross received support money directly from plaintiff by way of checks. (T. 35, 70; Ex. 13) Plaintiff could account for approximately $310 for a period of roughly six months. (Ex. 2, schedule B) The checks contained plaintiff's

Texas address, phone number and alias name. (Ex. 13)

In October, 1972, defendant went on welfare in Salt Lake City, Utah. (T. 68) She executed an "assignment" which assigned to the Division of Family Services ". . . all monies payable to me. . . from Richard Ross". (T. 68-9, 130; Ex. 4) Despite the assignment, defendant accepted $310 directly from Mr. Ross during the period from March through September, 1973 (T. 72), none of which defendant ever reported to welfare. (T. 73-5)

Plaintiff testified that the parties had an understanding between themselves to the effect that he would only have to pay child support and he could forget the alimony and arrearage in child support. (T. 17, 19, 159, 161, 172) Defendant denied such an agreement or understanding. (T. 65-8, 62) (But see T. 136, lns. 23-5)

At least as early as March, 1973, defendant knew plaintiff's exact address and the alias he was using since he began sending her checks with his return address on them. (T. 35, 70 and Exs. 13; 2, schedule B) Defendant never made any effort, at any time, to notify Recovery Services, welfare, or any other officials of plaintiff's whereabouts (T. 131-2), nor did she attempt to force him to pay any back child support during this period. (T. 134-5, 63-4, 71)

The Divison of Recovery Services did institute a legal proceeding in November, 1973, in Utah against the plaintiff in Texas, but said proceeding was later dropped prior to service (apparently after the Attorney General

discovered the settlement). (T. 113 and Ex. 20) Defendant was totally unaware that said action was filed. (T. 130)

The October, 1972, "assignment", wherein Carol transferred to the Division of Family Services all monies payable from the plaintiff, also authorized the compromising of any and all claims without further notice to herself. (T. 68-9, 130 and Ex. 4)

Plaintiff himself later initiated contact with Recovery Services, without ever having been contacted or found by them, in approximately July, 1973, through a Dallas attorney. (T. 27-30; Exs. 17-19) Plaintiff later called Mr. Zambos personally and alleged to have arrived at an agreement whereby certain amounts would be paid every month and the arrearage would be compromised. (T. 30, 161-4 and Ex. 16) This was disputed by Mr. Zambos. (T. 115-6, 152)

After the alleged agreement, plaintiff made regular payments to the Family Support Division as follows (T. 27-30 and Ex. 15):

a. Two checks dated August 4, 1973, and September 17, 1973, for $232 each for a total of: $ 464.00

b. Payments for the balance of 1973 to Recovery Services by check: $ 650.00

c. Checks to Recovery Services, 1974: $2,475.00

d. Checks to Recovery Services, 1975: $2,700.00

e. Checks to Recovery Services, January, 1976: $ 225.00

Total: $6,514.00

In December, 1975, plaintiff visited Salt Lake City at the request of the defendant (T. 167-8, 20), and was at that time asked by defendant to return to Salt Lake City so that the children could have a father and a family. (T. 167-8) Plaintiff thereupon returned to Dallas, Texas, quit his job and incurred substantial detriment in moving all of his belongings to Salt Lake City. (T. 169-70)

Plaintiff and defendant began living together as man and wife in January or February, 1976, although they did not remarry. (T. 168, 142-3) They lived together at the home of defendant's parents until approximately September, 1976, at which time they purchased a house as "joint tenants, husband and wife". (T. 169-70, 144-5 and Exs. 32-34)

During this period when they were together, the plaintiff paid substantial sums for the support of the children and the defendant, as well as a $5,000 downpayment on the home the parties purchased in September, 1976. (T. 173-6, Ex. 2, schedules C-G) Plaintiff has paid the house payment of approximately $365 per month every month beginning September, 1976, through December, 1977. (T. 144-5) The defendant and the three children have lived in said house since September, 1976, and at all relevant times during this action. (T. 144-5)

During all relevant times from February, 1971,

through trial, defendant was a good mother, the children were well cared for, and suffered absolutely no want, hardship or privation. (T. 55, 96)

During the period from February, 1971, through the time when this legal action was filed, defendant never made any attempt whatsoever, or filed any claim, to collect alleged arrearages in child support and alimony. (T. 134-5, 63-4, 71, 130-2) Her counterclaim in this action alleging the arrearages was filed after she was served with the process in this action, as well as a separate suit for quiet title to the home. (T. 182)

POINT I

THE DOCTRINES OF EQUITABLE ESTOPPEL AND LACHES BOTH APPLY TO BAR THE DEFENDANT HEREIN FROM CLAIMING ARREARAGES IN CHILD SUPPORT AND ALIMONY. THE COURT MISUNDERSTOOD AND MISAPPLIED THE LAW IN THIS REGARD; THE EVIDENCE CLEARLY PREPONDERATES AGAINST THE FINDINGS MADE TO THE EFFECT THAT SAID DOCTRINES DO NOT APPLY; AND THIS HAS RESULTED IN SERIOUS INEQUITY AND A CLEAR ABUSE OF DISCRETION.

A
THE LAW OF THIS CASE

Standard on Appeal

This Court has held that divorce actions are equity proceedings and this Court may review the evidence and make its own findings. Barker v. Dunham, 9 Utah 2d 224, 342 P. 2d 867 (1959); Article VIII §9, Utah Constitution. However, the Supreme Court will not exercise this authority as a general rule since the trial court has considerable discretion in adjusting the financial and property interests of the parties. However, where the trial court has either misunderstood or misapplied the law resulting in substantial and prejudicial error; or the evidence clearly preponderates against the findings made; or a serious inequity has resulte as to manifest a clear abuse of discretion, this Court will step in and reverse where appropriate. Hansen v. Hansen, 537 P. 2d 491 (Utah 1975); Owen v. Owen, 579 P. 2d 911 (Utah 1978). Plaintiff-Appellant makes all three contention as grounds for reversal of the trial court's decision herein

Estoppel Was Clearly Justified in This Case

Defendant, due to explicit and/or implicit actions or representations, should be estopped from claiming or being awarded arrearages in child support and alimony. This Court has defined the standard in such cases:

> It is the prerogative of the trial ccurt to determine these facts and if he finds that facts exist to justify equitable estoppel, he should apply the doctrine and relieve the father of payment of the installments to the extent indicated. Larsen v. Larsen, 5 Utah 2d 224, 300 P. 2d 596 at 598 (1956).

The Trial Court's Findings

The trial court specifically found in its Memorandum Decision (R. 215) and its Findings of Fact and Conclusions of Law (Findings Nos. 7, 8 and 9, and Conclusions of Law No. 8, R. 225-7) that the doctrines of equitable estoppel, laches and waiver did not apply to the facts of this case. The trial court thus granted judgment against plaintiff on defendant's counterclaim for arrearages in child support and alimony in the sum of $24,457 (after deducting $5,000 for the downpayment on the house) as well as $1,544 against the plaintiff in favor of the Utah State Department of Social Services for welfare assistance paid to the defendant. (R. 229) This judgment is erroneous under the standards of Hansen and Owens, supra, and should be reversed.

The Standard of Larsen v. Larsen

Utah has recognized the principle of equitable estoppel and related doctrines to bar a mother from collecti a large, cumulative debt for arrearages in child support and alimony. In Larsen, the father responded to the mother's claim for arrearages in child support and alimony by allegin that the mother had refused to accept payments; that a third party was helping to support the child; that all the mother asked the father to do was refrain from seeing her and the child; and that the father had undertaken additional obligations in reliance upon the alleged agreement with, or actions of, the mother. The mother admitted that she had not tried to collect any of the back payments over a period of eight years.

The trial court ruled that equitable estoppel was not available as a defense for non-payment of accrued support for a minor child and the father appealed. 300 P. 2d at 597. The Supreme Court reversed noting that there was sufficient evidence that the trial court could reasonabl find laches, acquiescense, or equitable estoppel. Id. The Court carefully distinguished between a claim that the alleged agreement or actions of the mother barred her recovery of past or accrued amounts, as opposed to a claim wherein the alleged agreement or actions were used as the basis for seeking a modification which would be binding for future payments. In this conjunction, the Court held:

> However, this does not mean that a mother may not by her actions or representations, or both, preclude herself from recovering past-due installments of support money which she has spent for the support of the child. Where the father's failure to make such payments was induced by her representations or actions and where as a result of such representations or actions the father has been lulled into failing to make such payments and into changing his position which he would not have done but for such representations, and as a result of such failure to pay and change in his conditions, it will cause him great hardship and injustice if she is allowed to enforce the payment of such back installments, she may be thereby estopped from enforcing the payment of such back installments. (emphasis added) 300 P. 2d 597.

Justice Crockett emphasized in Baggs v. Anderson, 528 P. 2d 141 (Utah 1974) that support money falls into two separate categories:

> First, the current and ongoing right of a child to receive support money from his father (parent); and second, the right to receive reimbursement for support of a child after that has been done. Id. at 143.

In the second instance, an estoppel to collect arrearages in support may arise where this essential element is found: some conduct on the part of the mother which reasonably induces the obligor to rely thereon and make some substantial change in his position to his detriment. (emphasis added) 528 P. 2d at 143. See also Clark v. Chipman, 510 P. 2d 1257 (Kan. 1973)

As to the mother's power to make representations

or take actions compromising arrearages in child support, the Court in Larsen noted:

> If the child has been the beneficiary of equivalent support and education so that the mother is entitled to receive all of said past-due support money, she should be free to release, compromise, or waive that which is hers. 300 P. 2d 597.

The standard of equitable estoppel to collect arrearages in child support and alimony, as set forth in Larsen, was reaffirmed in several subsequent Utah cases other than Baggs.[3] In French v. Johnson, 16 Utah 2d 360, 401 P. 2d 315 (1965) the standard of Larsen was recognized, although not applied. The plurality (with one concurring and two dissenting) felt that the facts simply showed "no representations, either explicit or implicit" by the wife to the husband. Id. at 315. The facts in French stand in contradistinction to the facts of the case at the bar where explicit representations or agreements or implicit representations (actions and conduct) are claimed.

Furthermore, although there was a dispute in this Court as to the application of the legal standard to the facts in French, Justice Crockett's statement in the dissenting opinion summarizes well the objective in this type of case:

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[3]A recent Utah case presents some superficial fact similarities to the case at the bar. (See Ciraulo v. Ciraulo, 576 P. 2d 884 (1978). However, in Ciraulo, the issue of equitable estoppel does not appear to have been raised. The main issue appears to have been substitution of benefits.

> Nevertheless, it must be remembered that the equities are not always all on one side, and that each situation should be dealt with on its own facts and toward the objective which is fundamental to all such proceedings, that of best serving the welfare of all concerned. When viewed in that light, the circumstances may well be such as to justify the Court invoking its equitable power and refusing to enforce immediate collection of a large accumulated debt. 401 P. 2d at 317.

See also Wasescha v. Wasescha, 548 P. 2d 895 (Utah 1976).

The facts of the case at the bar compel the finding that the conduct of the defendant is such as to reasonably induce plaintiff to rely thereon and make some substantial change in his position.

B

REPRESENTATIONS AND IMPLICIT AGREEMENT OR CONDUCT JUSTIFYING RELIANCE

The Preponderance Of The Evidence Showed At Least Implicit Representations And Conduct By Defendant Which Compel The Finding Of Equitable Estoppel As To The Claims For Arrearages Of Both Child Support And Alimony

It is conceded that plaintiff was wrong in leaving defendant with three children in California after the divorce. (T. 10, 155)[4] Appellant asks this Court simply to look at all the facts and circumstances which took place thereafter and which were ignored by the trial court. These facts point either to an implicit agreement or understanding based upon defendant's or her agent's representations or conduct, which justified plaintiff in taking action to his detriment, all of which form the basis for estoppel

Mr. Ross' Agreement With Mrs. Ross

Mr. Ross stated that Mrs. Ross made representatio to him as early as October, 1972, to the effect that she would not consider him liable to pay the full amount under the divorce decree if he would simply start paying support for the children. (T. 15-17, 159) Mr. Ross further claime

[4]It is also noted, however, that plaintiff had no attorney at the California hearing at which he was ordered to pay $450 a month total on an income of approximately $1,000 per month, and in which defendant was given the entire equity in the family home which she later sold for a $25,000 profit. (T. 215)

to have had similar conversations in January, 1973, February, 1973, summer and fall of 1973, December, 1975, January, 1976, and at various times thereafter. (T. 19, 159, 160-1, 164-5, 172) Regarding the October, 1972, conversation, Mr. Ross testified as follows:

> I don't remember the exact conversation, but we had talked, and I told her I wanted to see the kids. And she said, you know, she wouldn't push anything as long as I paid support, and it would be all right for me to come up there (Salt Lake City) and see the kids...this is all she really wanted is for me to take care of the kids. I told her I didn't mind doing this. (T. 17)

Regarding the February, 1973, conversations, Mr. Ross testified:

> There is no way I can remember the exact words. The gist of the conversation was I would assume responsibility for taking care of the kids and she wouldn't hassle me on alimony. (T. 161)

Regarding conversations in July, August, and September, 1973, the substance thereof was basically the same as the above two conversations. (T. 164-5) All of the relevant facts and actions of the defendant lend credence to the testimony of Mr. Ross and cast that of Mrs. Ross in doubt.

Mrs. Ross' Inconsistent Testimony Regarding These Conversations

On direct examination by her own attorney, Mrs. Ross was very definite about the fact that after the California divorce in February, 1971, she next heard from Mr. Ross in February, 1973. (T. 34) She further stated under direct examination by her own attorney the following:

Q: From the time of the divorce, Carol, which is February, 1971, up through the period when he actually started living in your parents' home, which is January of 1976, what if anything was ever said about the back payments of alimony and child support that he had not paid during that period?
A: Nothing.
Q: Nothing was ever said about it?
A: No.
Q: There was nothing said about the back payments during this Christmas visit or at any other time?
A: No. (T. 48)

On another occasion, defendant Carol Ross testified as follows:

Q: (Mr. Williams): In fact, you have already testified here today, haven't you, that you never did have a conversation about back payments with the plaintiff until you were living together (January, 1976)? Isn't that true?
A: Yes. (T. 152)

Under cross-examination, defendant had to admit that these statements were not correct or fully truthful. First, she admitted that Mr. Ross made contact with her as early as October, 1972, instead of February, 1973, as previously testified. (T. 34, 59, 62) Then, she later testified that she remembered yet another conversation in January, 1973, wherein he called her and discussed child support:

Q: (Mr. Sykes): What did you talk about?
A: He wanted to come up here and see the kids for a few days and make some kind of arrangements for child support and straighten his name out. That was the purpose of the visit.

. . . . .

Q: He indicated to you a desire to pay child support and get that straightened

around, is that right?
A: He wanted to make some arrangements for it, yes. (emphasis added) (T. 63)

Mrs. Ross further testified that when Mr. Ross visited her and the children in February, 1973, the subject of child support and alimony came up, with the topic centering around how much he was going to pay. (T. 67)

The Court definitely had a conflict in the evidence before it, but this certainly should have been resolved in plaintiff's favor where defendant's testimony was so glaringly inconsistent. Furthermore, it is highly unlikely that Mr. Ross would come a thousand miles from Texas to discuss child support and not even broach the subject of past-due payments. He re-established contact in at least October, January and February of 1972-3, and actually made a trip to Salt Lake City. He began paying some support money in March. 1973. (T. 35) It only makes sense that an implicit understanding was reached.

Mrs. Ross Made No Effort To Report Mr. Ross To Recovery Services Or To Compel Him To Pay Child Support

If there was no understanding or agreement regarding past-due and future child support, as alleged by Mrs. Ross, then it stands to reason that she would make every effort to let the authorities know where Mr. Ross was in order to make him pay child support. On the other hand, if the parties did have an understanding that Mr. Ross could forget past-due child support and delinquent alimony, as

was his testimony, one would expect Mrs. Ross to take no such action against Mr. Ross even though she knew his where abouts.

Mrs. Ross attempted to adopt the former position at trial by indicating that she was extremely angry with Mr. Ross in 1972 because of his failure to pay child support. (T. 127, 143, 152) But again, the evidence does not bear out defendant's truthfulness in this regard. The evidence clearly supports the inference that there was some type of understanding between the parties in accordance with plaintiff's testimony.

The February, 1973 Visit

There is no dispute about the fact that the plaintiff came to Salt Lake to visit the children during the period from February 16th through February 18th, 1973. (T. 63-7) She knew where he was staying and they visited together several times. (T. 65-7) During this time she could have easily had him picked up or served with an Order to Show Cause, had she wanted.

Never Reported Mr. Ross To Recovery Services

It is significant to note that Mrs. Ross went on welfare in Salt Lake City in October, 1972. (T. 68) She was well aware that the "welfare people" could have made Mr. Ross pay something for child support. (T. 70) She even attempted to get the district attorney in San Mateo County to take some action against Mr. Ross in the

early part of 1972, prior to the time that Mr. Ross says they came to an understanding. (Ex. 25, letter of 11/20/72; T. 130)

She further admitted that she knew that Recovery Services was looking for Mr. Ross after she went on welfare. (T. 131-2)

Her story is all the more unbelievable after March, 1973, because at that time, she began receiving checks from Mr. Ross, who was living in Texas under his alias name. (T. 132, Ex. 13 and Ex. 2 schedule B) The checks contained Mr. Ross' name, address and telephone number. If she wanted to turn him in, it would have been simple.

Despite receiving money from Mr. Ross, she never discussed the matter with Recovery Services (T. 131) or attempted to report any of the money she received. (T. 73) This was so despite the fact that she knew that welfare prohibited "double-dipping" and required her to report money received from other sources. (T. 69-70) Furthermore, she never reported to Recovery Services any of her conversations of October, 1972, January 1973, or thereafter. (T. 63-4)

Mr. Ted Zambos, a special investigator for Recovery Services, testified that it was customary to check with the mother from time to time about the location of the father when the file comes up for review every 40-60

days. (T. 102-105) He further indicated that he would have made his first contact with Mrs. Ross in approximately November, 1972, but his file recorded nothing regarding any information provided then, or subsequently, by Mrs. Ross as to Mr. Ross' whereabouts. (T. 103; see all of the letters in Ex. 25) Mr. Zambos' file was full of letters indicating attempts to discover the whereabouts of Mr. Ross through September, 1973, or a period of at least six months when Mrs. Ross without question knew his whereabouts! (T. 107-11)

All of this is highly suggestive of the fact that the parties had an understanding with respect to the payment of child support, both past and future, and Mrs. Ross was acting on that agreement in not reporting Mr. Ross.

Mr. Ross' Attorney Contacts Carol Ross

If Carol Ross had any doubt as to Mr. Ross' whereabouts, or the good faith of his effort to get the child support problem resolved, it should have been erased when she received letters from Mr. Ross' attorney in Dallas (Exs. 18, 19) The letters were dated July 25 and July 27, 1973. Mrs. Ross inexplicably did not remember receiving said letters. (T. 134) The substance of the contact is set forth in the last paragraph of said letters:

> Since it is Mr. Ross' desire to clear up his past, I am therefore sure you can understand the procedure he is following in this matter. (emphasis added) (Exs. 18, 19)

There is no evidence that Mrs. Ross ever turned these

letters into welfare or took any action to report Mr. Ross at this point.

Mr. Ross Makes Contact With Recovery Services

Mr. Ross testified that he made contact with Recovery Services for the purpose of getting the matter of past and future child support and alimony straightened out. (T. 27-30, 161-4) He employed an attorney for this purpose. (T. 162 and Exs. 17, 18 and 19) The first two checks were paid to Recovery Services on August 4, 1973, and September 17, 1973. (Ex. 2 schedule B and Ex. 26, checks numbered 322 and 359) An agreement was eventually reached (the terms of which will be discussed below) (see Ex. 16) and the plaintiff began making payments directly to the Family Support clerk. (See Ex. 15) But again, defendant took no effort to press any collections of arrearages allegedly due for child support and alimony.

This is conduct consistent with the position that the parties had an understanding regarding arrearages: Mr. Ross would pay child support and Mrs. Ross would not press any arrearages.

Christmas Visit Of 1975

Both of the parties testified that the plaintiff visited the children in Salt Lake around Christmastime, 1975. (T. 139-40, 165-6) While here, Mr. Ross stayed with the defendant at her parents' home, and lived on the

same floor! (T. 46, 165-8, 141) Certainly, if the defendant had wanted to "get" the plaintiff, she could have done it at that time easily. Thus, once again, her actions are more consistent with Mr. Ross' version of the facts: i.e. that the parties had an understanding that the back child support was relinquished. In fact, Mr. Ross testified that he was not at all concerned when he came to Salt Lake at this time, because he was current and the matter of the past child support had been resolved. (T. 165-6)

Return To Salt Lake City Permanently

Plaintiff testified that while living at defendant's home during the Christmas season, 1975, they discussed reconciliation and Carol asked him to move to Salt Lake City and move in with her so that they could raise the children like a family again. (T. 167-8) Carol Ross denies this version of the story, claiming that they were never even alone (!!) during the entire three days. (T. 140) Plaintiff's version is obviously more credible since Carol sent plaintiff a list of car dealers for possible jobs shortly thereafter (T. 168, 46), and allowed plaintiff to move in with her in January, approximately one month later, and they began living together as man and wife. (T. 46, 168)

Defendant could have easily had plaintiff taken into custody or served with an Order to Show Cause in the event that she was concerned with delinquent support and alimony payments.

The Parties' Reconciliation

It is undisputed that the parties lived together as man and wife from either late January, or early February, through December, 1976, a period of approximately one year. Ironically, defendant claimed at trial that she was still mad about arrearages during this period, but never did anything:

> Q: Were you still mad about the fact that you hadn't received child support and alimony? (After Mr. Ross had moved back to Salt Lake and began living with her)
> A: It didn't make me happy. It was brought up.
> Q: It was brought up? And you said when you began living together, you still owe me child support and alimony; pay up as soon as you can, something to that effect? Was that it?
> A: No. (T. 143)

Defendant later testified again that even after they began living together, she wasn't willing to make any concessions:

> How can you forget something like that? There was a lot of debt. He owed me a lot of money. (T. 152)

Despite this "anger", defendant never took any action to collect any of the money allegedly owed. Once again, this is much more consistent with plaintiff's version of the facts: there was an understanding regarding the waiver of past-due child support and alimony.

The Second Separation

In September, 1976, the parties purchased a $42,000 home, with plaintiff making a $5,000 downpayment.

(T. 144-5) The parties lived there together with their family until late December, 1976, or a period of approximately three months, at which time they split up again. (T. 170) Obviously, at the time that they split up for the second time, feelings toward each other could not have been the most favorable. Yet, once again, defendant took no action whatsoever to attempt to force the payment of any arrearages. This again is consistent with the theory of the arrangement between the parties.

No Protest Or Demand Until Lawsuit Filed

Probably the most convincing argument against the position taken by defendant and in favor of the estoppel claimed by plaintiff is the fact that defendant never took any action, made any demand, lodged any protests, or did any other act, to show her dissatisfaction with the arrangements alleged by plaintiff until plaintiff filed a lawsuit against her (T. 182) to recover the house in December, 1977. In defendant's own words:

> Q: (Mr. Sykes): So you never protested to anybody in 1973, 1974 or 1975, to anybody, did you?
> A: No.
> Q: Ever?
> A: No.
> Q: You never made any objection to anybody?
> A: No. (T. 134-5)

In fact, if defendant's own testimony is to be believed, she never even had a conversation (much less, a protest) with plaintiff himself until they began living together again in January, 1976. (T. 152)

Unlikely Reasons for Non-Protest

Although she began receiving $225 per month around August or September, 1973, defendant never protested to anybody about the past-due support or the fact that it wasn't what the Court had originally ordered. In her own words, she felt that it would be a "hopeless" act (T. 134-5) because: the plaintiff was unreliable when he made arrangements (T. 129, 71); and she usually got "nothing" whenever he promised to send her something. (T. 71)

This statement is hard to square with the fact that once plaintiff at least thought he had an agreement, he began paying regular monthly payments and never failed to make the amount due for 30 months, from August, 1973, through January, 1976, when the parties moved in together. (Ex. 15) Furthermore, he made every house payment without fail from September, 1976, through December, 1977. (T. 144-5, 170)

Either Representations (An Understanding) Or Conduct Justifying Reliance

Once again, defendant's version of the alleged unreliability does not square with the actual facts. Plaintiff's regular, responsible payments of the "agreed" child support amounts, plus payments of the house payments which gave defendant and the family a free place to live for sixteen months, combined with defendant's lack of protest for nearly 80 months, by her own admission, force the in-

escapable conclusion that there was an implicit agreement or understanding between the parties that past-due child support and alimony was waived or released. If there was no implicit agreement, there is certainly conduct which lulled plaintiff into failing to make payments or seeking modification. (T. 169)

Defendant should thus be estopped from claiming arrearages in this action.

C

DEFENDANT HAD AN ACTUAL, EXPRESS AGREEMENT WITH RECOVERY SERVICES, ACTING ON DEFENDANT'S BEHALF

Initial Contact With Recovery Services

Plaintiff testified that he got somewhat nervous about making payments directly to defendant, because he didn't think it was right that she also be on welfare at the same time. (T. 27-8) He thus contacted his lawyer in Dallas, whose efforts eventually led to plaintiff making direct payments of $234 each in the months of August and September, 1973. (T. 27-8, 162 and Exs. 17-19)

Meanwhile, the efforts of Mr. Zambos to find the plaintiff were independently coming to fruition and he did locate the address of Mr. Ross in late September, 1973. (T. 108) This apparently led to the telephone call in which the two talked on October 2, 1973 (T. 109), and led to Mr. Zambos' letter to Mr. Ross of October 4, 1973. (Ex. 16)

The "Assignment of Collection Of Support Payments"

On October, 1972, defendant applied for welfare (T. 75) and executed the "assignment" which reads in pertinent part as follows:

> ...I, Carol D. Ross, hereby assign, transfer and set over to the Utah State Division of Family Services... all monies payable to me and/or my child from Richard M. Ross...and also past support and alimony due me... [I] further authorize said assignee to do every act and thing it deems

> necessary to collect the support and/or alimony payments, including any and all legal action it deems necessary or the compromising of my or our claims without further notice to me. (emphasis added) (Ex. 4)

This document clothed the Department of Social Services with the express authority to inter alia waive or compromise any claim for arrearages in child support and alimony. This is so because in the first paragraph, a claim for "past support and alimony due me" is recognized. In the second paragraph of Exhibit 4, the express authority is given for the "compromising of my or our claims".

This compromise provision makes good sense and good public policy: it may often be necessary to compromise all arrearages of both support and alimony in order to get a repentant, but non-wealthy father to begin paying in the here and now and ease the State of a welfare burden. The past due portion is generally impossible to collect anyway.

This assignment cannot be so narrowly construed as to only grant the authority to waive or compromise the State's portion of money collected (for past welfare payments made), since it is couched in the language of "compromising of my or our claims". "Claims" means the whole sum of the arrearage could be given up although the State would only be partially subrogated (to the extent of welfare payments).

There are absolutely no relevant limitations on

the authority granted to the Department of Social Services in this assignment regarding the compromising of arrearages in child support.

Mr. Ross' Contact With Mr. Zambos

The contact between plaintiff and Mr. Zambos of the Department of Social Services has been set forth above in detail. (T. 161-5) Mr. Ross testified that he initiated the contact with Recovery Services through his attorney (T. 162); that he subsequently made a direct telephone call to Recovery Services and talked to someone who's name he couldn't remember (T. 162); and thereafter received a letter from that person. (T. 162-3, Ex. 16) He further testified with respect to arrearages as follows:

Q: What did he (Zambos) tell you with respect to what it meant to make those payments that you were making, the $225 a month?
A: That I would be current, caught up. And, you know, just continue to pay it and I would be, you know, out of trouble.
. . . .
Q: Did Mr. Zambos say with respect-- or was there any conversation at all, any mention of the past-due payments that the welfare department had paid?
A: I had asked if I owed anything from what I already paid her, and he said, "No".
Q: That was it?
A: Yeah. Otherwise, I could make payments.
Q: Did he say anything about the amounts accrued prior to the time she went on welfare?
A: No.
Q: But did he say if you make payments in

the future, that was all you have to make?

A: Right. (T. 164)

. . . .

Q: Do you recall any conversation from that point on, that totally into the future $225 would be the only obligation?

A: Yes.

Q: Do you have any independent recollection of statements made to you to that effect?

A: I asked them about it. I talked to them about if I owed them for any back payments or what the deal was, how do we work this out. He said get caught up from now and pay continually and everything will be fine. I was under the impression that if I stayed in Dallas, or anywhere else in the world, that as long as I paid this $225, everything was taken care of. (T. 30-1)

From this somewhat disjointed testimony, the conclusion is clear that Mr. Ross is claiming an oral agreement with Mr. Zambos on behalf of Mrs. Ross that plaintiff need not pay arrearages. It is only logical that this would have been on his mind since his previously stated purpose, in defendant's own words, was to "make some arrangements for it (child support)". (T. 63, 27-31, 162)

Mr. Zambos' Confirmatory Letter Of 10-4-73 (Ex. 16)

Mr. Ross was justified in the belief that he had made an agreement with Recovery Services on behalf of defendant to release the arrearages by virtue of the letter of 10-4-73. That letter (Ex. 16) reaffirmed the telephone conversation that apparently occurred between

Zambos and Mr. Ross on October 2, 1973. The letter clearly stated:

> ...you agreed to pay $75 a month child support for each child; totaling $225, effective September 1, 1973; furthermore, you agreed to double up on your payments to bring your account current by October 31, 1973. (Ex. 16)

Thus, Mr. Zambos twice used the word "agreed" signifying some type of permanent arrangement, which must have reference to the words "double up...to bring your account current..." Thus Mr. Ross was fully justified in believing, as he testified, that his account truly would be "current", or that he would owe nothing further if he was to maintain the "agreed" payments.

This is fully consistent with the written, express grant of authority given to Mr. Zambos in Exhibit 4 wherein he (an agent of the Department of Social Services) was fully authorized ". . .to do every act and thing. . . necessary or the compromising of my or our claims. . ." (as to "past support and alimony due me"). (Ex. 4)

No Independent Recollection

It was not surprising at trial that Mr. Zambos had no independent recollection of the telephone calls or facts surrounding the case of Richard Ross (aka Henderson) or Carol Ross. Nor did his file refresh his memory. (T. 98-9, 114-5) He did, however, confirm that his signature appeared on the letter of 10-4-73 (Ex. 16). (T. 109) He also confirmed what was obvious from the letter:

Q: (Mr. Sykes): I notice in this first paragraph you use the terminology "at which time you agreed to pay $75 a month." Then down in the fourth line you say, "Furthermore", I am quoting again from your letter, first paragraph, "you agreed to double up on your payments." When you used that terminology "agreed" were you referring to some arrangement between yourself and Mr. Ross?
A: Yes. (T. 110)

Thus, Mr. Zambos made an agreement with Mr. Ross.

Attempts To Limit Zambos' Authority Ineffectual--Legal Error Committed By The Court

Despite his lack of independent or refreshed recollection, Mr. Zambos attempted to "explain" the unwritten meaning of Exhibit 16 on cross-examination by his attorney. This sequence appears in the transcript on pages 114-117, and 120-121. The substance of his testimony was as follows:

a. That the letter of 10-4-73 was not meant to affect the California divorce decree (where Mr. Ross was to pay $450 per month not $225). (T. 116, lns. 10, 11)

b. That Ross was to begin paying $450 a month at the end of October. (T. 116, lns. 17, 18)

c. That it was not meant to affect alimony. (T. 116, lns. 23-5)

d. That his "general practice" was never to enter into an agrement where a father would pay less than the divorce decree provided. (T. 117, lns. 3-5, 8-9)

e. That there is some type of "general

procedure" as to compromise where arrearages would not be reduced. (T. 120, lns. 23-30; 121, lns. 1-10)

All of the above testimony was objected to by plaintiff's counsel, and overruled. Error was committed for the following reasons:

a. It is totally irrelevant and immaterial to the legal affect of Exhibits 4 and 16 in this case as to what Mr. Zambos may have done in other cases for Recovery Services in the past. (T. 115, lns. 7, 8) Mr. Zambos' answer should have been stricken in that regard.

b. Mr. Zambos' counsel attempted to lead him into an improper statement by intimating that Exhibit 16 "refreshed" his memory, when Zambos had previously testified that he had no independent recollection of any of the events on several occasions. (T. 115, lns. 21-30)

c. The Court allowed Mr. Zambos to testify about what the contents of the letter of October 4, 1973, "means or meant to you at the time". (T. 116, lns. 6-18) The witness had already testified that he had no independent recollection and thus the question was without foundation and the answer should have been stricken.

d. The same argument applies to Mr. Williams' questions about alimony payments in the letter of 10-4-73 and the way that Mr. Zambos handles it as a "general principle". (T. 116, lns. 29-30; 117, lns. 1, 2)

e. The Judge next allowed defense counsel to ask a leading question that was also without foundation about the general practice which would allegedly not permit Recovery Services to reduce any Court order. (T. 116, lns. 3-9) In addition, it called for a legal conclusion which Mr. Zambos was not qualified to make, i.e. what types of prior agreements between parties would or would not enable the

parties to pay less than the divorce decree specified. He cannot possibly be competent on that subject.

f. Once again, Mr. Zambos was asked questions about compromise and what the procedure has been as to the amounts to compromise. (T. 120, lns. 23-26) There were no foundational questions asked as to where he derived an understanding of the "procedure".

In general, Mr. Zambos' testimony was highly speculative as to what might have happened or what could have happened. (T. 123) It should have been excluded and it constitutes an abuse of discretion for the trial court to consider it.

Zambos' Explanations Have No Legal Basis

The attempts of both the other attorneys and Mr. Zambos to downplay the importance of the letter of 10-4-73 and the assignment, as well as trying to limit the authority or agency of Mr. Zambos, have no basis in law or fact. It is not at all important what Mr. Zambos subjectively thinks about his authority to compromise claims for past-due support. His actual authority is what counts. His actual authority is implied (in law) from words, conduct of the parties, and facts and circumstances surrounding the case. Bowen v. Olsen, 576 P. 2d 862 (Utah 1978). Thus, the agent's own understanding, or misunderstanding, of the scope of his agency is totally useless. The facts and written documentation surrounding this case clearly show the existence of the agency on the part of the Department of Recovery Services to compromise claims for arrearage.

Carol Ross Ratified The Reduction Of Amounts Allegedly Owed

At one point, defendant Carol Ross under examination by her own attorney attempted to show that she never made any concessions as to back child support or alimony. (T. 152, lns. 18-22) However, defendant admitted:

a. That she executed the assignment. (Ex. 4)

b. That Recovery Services was working to obtain child support payments for her (T. 131-2), as her agent.

c. That from approximately August, 1973, through January, 1976, Recovery Services collected $225 per month, on the average, from plaintiff on her behalf. (Ex. 15)

d. That the plaintiff was acting in reliance upon said procedure in making payments to the Family Support Divison. (Ex. 16)

e. That she took no steps to modify any arrangement whereby she was receiving support payments, or indicate dissatisfaction with the procedure. (T. 134-5)

The Courts have always held that the alleged unauthorized agency or act of the agent may be ratified when affirmance is accompanied by knowledge of the material facts. Where this is the case, a party will be estopped to deny the agency or authority of the agent. Fuqua Homes Inc. v. Grosvenor, 569 P. 2d 854 (Ariz. 1977)

It is clear that defendant and the State must be estopped from denying the agency of Mr. Zambos in recovering less than the amount that she was allegedly due under the California decree. Findings of Fact Nos. 7, 8 and 9 are in error and the decision must be reversed.

D

MR. ROSS HAS BEEN LULLED INTO FAILURE TO MAKE CHILD SUPPORT AND ALIMONY PAYMENTS AND IT WOULD CAUSE HIM GREAT HARDSHIP AND INJUSTICE IF MRS. ROSS WERE NOW ALLOWED TO ENFORCE THE PAYMENT OF SUCH BACK INSTALLMENTS

The Larsen Standard

A plaintiff seeking to establish estoppel must show that the mother's actions lulled him into failing to make the payments and into changing his position, which he would not have done but for the representations or the actions of the mother. Furthermore, it must be shown that great hardship and injustice would result if the mother was allowed to enforce the payment of back installments. Larsen, supra.

Detrimental Change of Position

Mr. Ross testified on several occasions about his detrimental change of position. (T. 20-1, 23-4, 169-70, 151; see also Answers to Supplemental Interrogatories, No. 4, R. 101)

Failure to Seek Modification Of Divorce Decree

Probably the most important single detriment to plaintiff sustained in reliance upon the implicit agreement or conduct of defendant was his failure to seek modification of the February, 1971, divorce decree. Defendant admitted that she made a substantial amount of money on the sale of the house in California (T. 215) in approxi-

mately August, 1972, and that she became employed with Salt Lake County in approximately July or August, 1973. Either of these changes in circumstance would have arguably been grounds for a modification of the 1971 decree.

Plaintiff had a lawyer in Dallas, with whom he obviously discussed the entire matter of modification. (T. 169, Exs. 17, 18 and 19) In fact, plaintiff testified as follows:

> Q: Going back to 1973 just for a moment, did you ever consider filing an action to modify the decree during 1973?
> A: I didn't think I needed to. I thought when I talked with Recovery Services that we had that all arranged. I just assumed, you know, everything was taken care of at this point. (T. 169)

Coming To Salt Lake In January, 1976

Plaintiff came to Salt Lake City around Christmastime, 1975, to visit the children. Plaintiff claims that defendant asked him at that time to return to Salt Lake and live with her and the children as a family. (T. 167-8) Defendant denies that she made this request at Christmastime T. 140), but the facts speak for themselves. Plaintiff returned to Salt Lake City permanently in January, 1976, and moved right in with defendant, sharing the same floor in the home of defendant's parents. (T. 141-2) Plaintiff claims that they began living together as man and wife almost immediately, while defendant claims that it wasn't for at least a month. (T. 169, 142)

As a result of the move to Salt Lake City, plaintiff testified that he sustained the following specific detriments:

a. He quit his job in Dallas (T. 169) wherein he earned approximately $16,637 in 1975. (T. 183, Ex. 36) (Mr. Ross explained why his 1975 tax return did not accurately reflect his income due to an error). (T. 183-4)

b. He took a lower paying job in Salt Lake. (Ex. 11; T. 23, 169)

c. He had to rent a trailer to haul his belongings to Salt Lake. (T. 169)

d. He had to get a friend to drive one of his cars up to Salt Lake, presumably pay his expenses on the road, and buy a one-way ticket back to Dallas for him. (T. 169)

e. He had to sell a boat and trailer that he couldn't bring to Salt Lake. (T. 169)

f. He moved away from many of his friends. (T. 20-1)

g. He (with the defendant) purchased a house and paid most of the downpayment of $5,000 in September, 1976. (T. 24, 169-70) The house is now encumbered in ways that have led to this lawsuit since the parties are listed as husband and wife and owners in "joint tenancy". (Exs. 32, 33 and 34)

h. Plaintiff paid a personal judgment of of the defendant's. (T. 151 and Ex. 14)

Not insignificantly, it should be emphasized that at no time did plaintiff ever again seek to file a modification of the action until December, 1977, when defendant refused to leave the home. (T. 182) By this time, thousands of dollars in "arrearages" had accrued.

Purchase Of The House As A Detriment

It is particularly significant, as a detriment to plaintiff, that he purchased the house at 1084 Grambling Way. He testified that he purchased said home with the defendant as a joint tenant and as "husband and wife" in September, 1976, with a downpayment of $5,000 that was almost entirely his. (T. 169-70, 144-5) Mr. Ross made all of the payments on the home. (T. 144) It was obviously his home, and his responsibility. He testified that he allowed her to live there, as per agreement when they split up in December, 1976, through June, 1977, so that the children could go to school. (T. 170)

Because of the fact that both of their names were legally on the purchase documents for the house, friction developed between the parties, with the defendant refusing to remove her name from the house although she had made no payments whatsoever on it and really had no valid ownership interest therein. Plaintiff's filing of the quiet title and modification action (T. 182) prompted defendant to file a counterclaim for arrearages which led to the judgment in this action.

This has caused plaintiff many thousands of dollars in attorney's fees as well as forced sale of the home and the holding of the money in escrow pending the outcome of this action. (R. 238-242) None of this would have happened if plaintiff had not justifiably relied on the

fact that he thought he had an agreement, and thus taken no action to secure modification or redress for six to seven years.

E

THE DEFENDANT-MOTHER MAY BE ESTOPPED FROM CLAIMING THE RIGHT TO RECEIVE REIMBURSEMENT FOR SUPPORT OF CHILDREN WHEN SAID SUPPORT HAS ALREADY BEEN PAID

The Legal Standard

When dealing with arrearages for child support (as opposed to future payments due), the mother has the right to make a decision releasing the claim for the amount due. In Larsen v. Larsen, the Court held:

> If the child has been the beneficiary of equivalent support and education so that the mother is entitled to receive all of the past-due support money, she should be free to release, compromise, or waive that which is hers. Larsen, supra at 598.

This is especially true where the support awarded by the decree has been paid in full or in part by an out-of-court third party and not by the mother. In Wasescha v. Wasescha, supra, the Court held that there is no action for arrearages where the support has been satisfied by one not claiming reimbursement in Court. Wasescha, supra at 896. As the Court pointed out in Baggs v. Anderson, supra:

> This right of reimbursement belongs to whoever furnished the support; and it is subject to negotiation, settlement, satisfaction, or discharge in the same manner as any other debt. Baggs, supra at 143.

Either Defendant Or Her Parents Paid The Support

Defendant claimed on several occasions that either she (T. 152) or her parents (T. 215) paid the support herein. If the support was paid by her parents, her counterclaim must fail since they are not a party to the action. If it was paid by herself, she has released any right to reimbursement for arrearages for the reasons set forth above.

F
NO CONSIDERATION IS REQUIRED WHERE PARTIES CHANGE THE MONETARY TERMS OF A DIVORCE DECREE WITH RESPECT TO ARREARAGES

This Court has held that the parties may make agreements changing the monetary terms of a divorce decree except where future child support is concerned, absent fraud, hardship, etc. Wallis v. Wallis, 9 Utah 2d 237, 342 P. 2d 103 at 104 (1959). Because the validity of such an agreement rests upon equitable estoppel, laches, etc. and because estoppel sounds in equity, and not in law, legal consideration is not required. 28 AmJur 2d, Estoppel and Waiver, §30, p. 634.

POINT II

THE FATHER MAY UNDER CERTAIN CIRCUMSTANCES MAKE CHILD SUPPORT AND ALIMONY PAYMENTS IN SOME MANNER OTHER THAN AS DECREED BY THE COURT; IN ANY EVENT, THE COURT IN THE EXERCISE OF ITS EQUITABLE DISCRETION IN THIS CASE SHOULD CREDIT THE FATHER WITH SUCH PAYMENTS AND FIND SUBSTANTIAL COMPLIANCE WITH THE DECREE.

A

THE COURT ERRED IN FINDING THAT PLAINTIFF HAD MADE CHILD SUPPORT PAYMENTS TO THE DEFENDANT IN ONLY THE SUM OF $7,024 (FINDING OF FACT NO. 3). THE COURT ALSO COMMITTED ERROR IN CONCLUDING THAT THE PLAINTIFF IS INDEBTED TO THE DEFENDANT IN THE SUM OF $16,082 FOR ACCRUED, UNPAID CHILD SUPPORT AND $7,675 FOR ACCRUED, UNPAID ALIMONY. (CONCLUSIONS OF LAW NOS. 4, 6, and 7)

The Applicable Law

The proposition that a father may not unilaterally decide when, where and how to pay child support and alimony requires no citation. This Court has often held that, as a general rule, alimony and support payments must be made to the mother and that the decree fixing the obligations of the parties cannot be modified or changed by the conduct of the parties. Stanton v. Stanton, 30 Utah 2d 315, 517 P. 2d 1010 at 1013 (1974). However, equity declares certain exceptions. The Stanton Court noted that the rule that a father may not "unilaterally" decide that he will not pay support and offset it by favors to the children may be

modified at times because:

> . . .in matters concerning the custody and support of children, because of their highly equitable nature, it is appropriate for the trial court to take into consideration the entire circumstances in making any order of enforcement of the decree, by contempt, or otherwise, having in mind his equitable powers to make any adjustment he may think fair and justified. 517 P. 2d at 1013-4.

This exception would apply all the more where the adjustments made by the father are not "unilateral", but consented to by the mother, as in the case at the bar.

Another Court has stated that although the husband cannot normally make payments directly to the children, special considerations of an equitable nature can justify the Court in crediting such payments on indebtedness to the wife when it can be done without injustice to her. Briggs v. Briggs, 165 P. 2d 772 (Ore. 1946)

Plaintiff Entitled To Greater Credit On Payment Of Support

This case is not one where the father has simply refused to make any payments over a long period of time, totally ignoring the needs of his family. The Court abused its discretion in failing to consider this factor.

The Plaintiff and his mother both testified that plaintiff called his mother within a few days of when he left California in 1971, inquired about the welfare of the children, and shortly thereafter began sending $200 to $250 per month to be used for their support. (T. 10-14; 83-90)

Mrs. McKendrick testified that every dime of that money was used for the support of the children. (T. 90) This would have amounted to a total of approximately $4,350. (Ex. 2, Schedule A; Ex. 21, IA and IV)

Additionally, plaintiff produced cancelled checks at the trial for $2,609, which represented money used for the support of the children during 1976-1977, primarily dental expenses, clothing, etc. (Ex. 2, Schedule E; Ex. 21, IE; Ex. 28; T. 155-7) (Defendant did claim that these were paid out of a joint checking account, however. (T. 147))

In addition to expenses that can be segregated just for the children, plaintiff paid the amounts shown on Exhibit 2, Schedules C and F (also summarized on Exhibit 21) which represent general support provided for family expenses during the time the parties were together. (T. 155-7) Schedule G of Exhibit 2, with the exception of the down-payment on the house, also represents expenses that are directly beneficial to the children and the family.

The parties also stipulated that if plaintiff were to testify, he would affirm that all of the expenses set forth in Exhibit 21 are amounts which should fairly be considered child support, with the exception of Schedule B (Ex. 27) which should be considered payment of alimony. (T. 155-6)

Altogether, in the event that this Court does not reverse the trial court on the basis of the argument set forth in POINT I, this Court should reverse at least to the

extent of decreeing that the amounts set forth in plaintiff Exhibit 21, totalling $28,003.09, should be credited to the account of the plaintiff for the following reasons:

a. The equitable circumstances of this case, recited above at length, require such findings.

b. The clear preponderance of the evidence, as recited above, compels the finding that all of said amounts were paid by plaintiff and intended by him to be payment of support obligations; and were accepted by the defendant as substituted of equal consideration for the support obligations.

As an example of the latter, see Exhibit 21, II, wherein house payments totaling $5,840 were made by plaintiff, thus providing defendant and the family with housing at no charge for over a year.

B

THE TRIAL COURT ERRED IN REFUSING TO ABATE THE ALIMONY AND CHILD SUPPORT FOUND OWING FOR THE TIME THAT THE PARTIES LIVED TOGETHER DURING A RECONCILIATION ATTEMPT

The Legal Standard

Counsel has found no Utah case specifically on point regarding this issue, but it has often been dealt with by other courts. In the case of In Re Peterson, 572 P. 2d 849 (Colo. App. 1977), the parties were divorced in November 1974. From January through September, 1975, the parties lived together with the children in the hope of effecting a reconciliation, as in the case at the bar. After the father

moved out, the mother claimed arrearages for child support and alimony. In upholding a ruling adverse to the mother, the intermediate Colorado Appellate Court held:

> . . .Under the circumstances of this case, where the parties made a good faith, although unsuccessful attempt at reconciliation, and where the husband supported the family at this time, we agree with the trial court that the support paid and contributed by the husband constituted payment of the installments accruing during the period that they were living together. This conforms to the public policy in the state "to promote and foster the marriage relationship and reconciliation of estranged spouses." (citation ommitted) 572 P. 2d at 851.

This policy should be adopted in the State of Utah.

The Parties' Reconciliation

The parties lived together in a reconciliation attempt from January through December, 1976. (T. 168, 144-5) In a sense, the reconciliation attempt continued even after plaintiff moved out of the house in December, 1976, since he allowed defendant to remain in the home; continued to provide considerable support; and even delivered a car to his wife to drive six months after he moved. (T. 195, 206, 217)

In any event, this Court should reduce the amount for which judgment was granted by the sum of at least $450 per month for each of the months in which the parties actually lived together, or from February through December, 1976, or a period of eleven months. That would result in a reduction of $4,950.

POINT III

THERE HAS BEEN A SUBSTANTIAL CHANGE IN CIRCUMSTANCES IN THE FINANCIAL CONDITION OF THE DEFENDANT, AS WELL AS IN OTHER REGARDS, WHICH JUSTIFIED THE COURT IN REDUCING THE ALIMONY AWARD TO 0 AND THE CHILD SUPPORT TO $75 PER MONTH PER CHILD.[5]

A
DEFENDANT'S CIRCUMSTANCES HAD SUBSTANTIALLY CHANGED FOR THE BETTER JUSTIFYING A DECREASE IN ALIMONY AND CHILD SUPPORT

The Legal Standard

This Court has always held that divorce decrees may be modified only upon the showing of a substantial change in circumstances. Osmus v. Osmus, 114 Utah 216, 198 P. 2d 233 (1948).

Plaintiff's Circumstances Basically Unchanged

Plaintiff testified that although he was unemployed for a certain part of 1971, his earning rate was approximately $1,000 per month while working. Thus, had he been employed for the entire year, he would have made approximately $12,000. (T. 197, 190) He also testified that his income

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[5]Although the Court ruled in favor of plaintiff on the issue of modification, and plaintiff makes no appeal in this regard, the argument in opposition to defendant's appeal on this point will be enclosed in this brief in POINT III in order to save the necessity of filing a reply brief, and to conserve the time of the Court in this matter.

at the time of the trial was approximately $1,200 per month (T. 191), and that his living expenses were approximately $1,110 to $1,167 per month.

It is clear that there is no substantial change in plaintiff's circumstances which would justify an increase in child support, or further payment of alimony.

Defendant's Circumstances

Defendant testified that at the time of the divorce hearing in California, she was not employed at all and had no other income from any source other than her father. (T. 208)

Defendant became employed in approximately May of 1973. (R. 146) Her payroll stubs for November, 1977, indicated that as of the end of that month, she had made approximately $8,096, and that by the end of the year she would make $9,000 for that year. (T. 209-10) In addition, and more importantly, her recent payroll stub for the period ending 2/28/78 showed that as of that date, for approximately 1/6 of the year, she had earned the sum of $2,404. This would project a yearly income of approximately $15,004. (T. 226) This is a substantial change for defendant. (T. 224, 226)

When viewed as a whole, there is little question that the facts and circumstances surrounding this case justify the Court's finding that alimony should be reduced to zero and child support should be reduced to $75 per month per child.

CONCLUSION

This is basically a case where actions speak louder than words. Plaintiff believes that the facts of this case, when viewed objectively, show the following:

a. Plaintiff made a mistake by leaving California and in a sense abandoning the family, but even so made some effort to support his children by payment of approximately $200 to $250 per month to his mother, who purchased clothing and food for the family.

b. The Plaintiff attempted to rectify his past mistakes by contacting the defendant, and paying her some money directly.

c. He further attempted to rectify his mistake by contacting Recovery Services and getting his "name straight" and arriving at an agreement as to what he could afford to pay.

d. Defendant, by her explicit or implicit representations, as well as by her conduct, should be estopped from claiming any arrearages of either child support or alimony.

e. Recovery Services, acting as defendant's agent, made an explicit agreement with the plaintiff, whereby defendant should also be estopped from claiming the arrearages.

f. The facts and circumstances as well as the conduct of the defendant during the entire period justify estopping her from claiming any arrearages in child support and alimony for the main reason that she failed to take any action whatsoever to collect said arrearages despite numerous opportunities. This conduct supports plaintiff's version of the facts.

g. The plaintiff reasonably relied upon the conduct and/or representations of the defendant and her agent, Recovery Services, and subsequently suffered great detriment, financial and otherwise.

In addition, plaintiff is entitled to a reduction in the judgment of amounts paid generally for support, even though they were not paid directly to the mother. Plaintiff is also entitled to an abatement on the child support and alimony during the times that the parties were reconciled and living together.

All of the facts and circumstances support a finding of substantially changed circumstances, justifying the modification of the California decree, as effected by the trial court.

Respectfully submitted,

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